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No. 89-210

In The

# Supreme Court of the United States

October Term, 1989

HARLEY AMOS AND GAIL AMOS,

*Petitioners,*

v.

BLUE CROSS AND BLUE SHIELD OF ALABAMA and JAN CULLIGHAN,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF FOR RESPONDENTS BLUE CROSS AND BLUE SHIELD OF ALABAMA AND JAN CULLIGHAN IN OPPOSITION

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## QUESTION PRESENTED

1. Are extra-contractual compensatory or punitive damages recoverable in an action brought pursuant to § 502(a) of ERISA, 29 U.S.C. § 1132(a), asserting wrongful denial of benefits under an ERISA plan?

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## BRIEF FOR RESPONDENTS BLUE CROSS AND BLUE SHIELD OF ALABAMA AND JAN CULLIGHAN IN OPPOSITION

This case does not justify the attention of the Supreme Court on certiorari. The case does not involve a federal question as to which there is a conflict among the federal circuit courts, in that every circuit court which has considered the issue is in accord with the decision of the circuit court below. The decision of the circuit court below does not conflict with any decision of the Supreme Court. Indeed, the decision below is consistent with the

logical extension of this Court's holding in *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134 (1985). Finally, no special or important reasons exist that merit review. Therefore, this case fails to meet any of the applicable criteria for granting certiorari stated in Rule 17 of the rules of the United States Supreme Court.

## STATEMENT OF THE CASE

This is an action for benefits under an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"). The action was filed initially in an Alabama state court against Blue Cross and Blue Shield of Alabama and Jan Cullighan, an employee of Blue Cross.[1] The state court complaint asserted various state law claims against defendants based on allegations of wrongful denial of benefits due plaintiffs under a group medical benefits contract.

Defendants removed the case to federal court, premising subject matter jurisdiction on the federal question

[1] Respondents are incorrectly named on the cover page of the petition for a writ of certiorari. Their correct names are:

Blue Cross and Blue Shield of Alabama
Jan Cullighan.

Blue Cross and Blue Shield of Alabama is a not-for-profit corporation organized as a health care service plan under the laws of the State of Alabama. It has no subsidiaries other than wholly-owned subsidiaries and no stockholders.

provided by ERISA. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

Following an order granting defendants' motion for a restated complaint, plaintiffs filed an amended complaint asserting claims under both ERISA and state common law, and seeking benefits under the ERISA plan, extra-contractual compensatory damages, and punitive damages.

Defendants then filed a motion to strike the claims for extra-contractual compensatory damages and punitive damages. By order dated December 30, 1987, the district court denied this motion to strike but certified the issue for appeal by permission pursuant to 28 U.S.C. § 1292(b). Defendants' petition for leave to appeal was denied by the Eleventh Circuit Court of Appeals on February 24, 1988.

Defendants then moved for reconsideration in the district court on the basis of the Eleventh Circuit's decision in *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988), in which punitive damages were held not recoverable in a case for benefits under ERISA. Following denial by the district court of the motion for reconsideration, *Amos v. Blue Cross-Blue Shield of Alabama*, 681 F. Supp. 1515 (N.D. Ala. 1988), defendants again petitioned the Court of Appeals for leave to appeal under 28 U.S.C. § 1292(b). The Court of Appeals accepted the appeal by order of May 11, 1988.

The Court of Appeals reversed and remanded, *Amos v. Blue Cross/Blue Shield of Alabama*, 868 F.2d 430 (11th Cir.

1989), holding that extra-contractual compensatory damages and punitive damages are not recoverable under ERISA.

Plaintiffs' application for rehearing and suggestion of rehearing *en banc* was denied on May 5, 1989.

## SUMMARY OF ARGUMENT

Extra-contractual compensatory damages and punitive damages are not recoverable in an action by a participant or beneficiary based on wrongful denial of benefits due under an employee benefit plan subject to ERISA. Recovery of such damages is not authorized by the civil enforcement provisions of ERISA, including specifically § 502(a)(1)(B) and § 502(a)(3). A private right of action to recover such damages may not be implied under ERISA.

At least seven of the circuit courts of appeals have held damages of this character not recoverable in ERISA cases for benefits. This conclusion is fully consistent with and is a logical extension of *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

Punitive damages and compensatory damages for elements such as emotional distress, mental anguish, inconvenience, and the like, were not historically awarded in equity or under the substantive law of trusts. This circumstances, considered in light of ERISA's connection with trust law principles, supports the no recovery rule extant in the law of the circuits.

## ARGUMENT

1. Every court of appeals which has considered the issue has concluded that extra-contractual damages are not recoverable in an action for benefits under the civil enforcement provisions of ERISA.[2] This issue has been addressed and decided by the First Circuit Court of Appeals in *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 825 (1st Cir. 1988); by the Fourth Circuit Court of Appeals in *Powell v. Chesapeake & Potomac Telephone Co. of Virginia*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (section 502(a)(3) does not permit the recovery of compensatory or punitive relief for a participant's physical ailments, decline of her marriage, her son's emotional distress, or her own emotional distress caused by the mishandling of a claim for disability benefits); by the Fifth Circuit Court of Appeals in *Sommers Drug Stores Co. Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1462-64 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 and 479 U.S. 1089 (1987) (neither § 409(a) nor § 502(a)(3) permit a participant or beneficiary to recover punitive damages); by the Sixth Circuit Court of Appeals in *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987) (punitive damages are not recoverable under § 502(a)(3) of ERISA); by the Seventh Circuit Court of Appeals in *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 627 (7th Cir. 1987) (punitive damages are not recoverable

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[2] The term extra-contractual damages will be used in this brief in opposition to include both punitive damages and extra-contractual compensatory damages, such as damages for personal injury, emotional distress, mental suffering, inconvenience, and the like.

under § 502(a)(3)); by the Ninth Circuit Court of Appeals in *Sokol v. Bernstein*, 803 F.2d 532, 534 (9th Cir. 1986) ("[d]amages for emotional distress are unavailable under § 502(a)(3) [of ERISA] as well as under § 409"); and by the Eleventh Circuit Court of Appeals in the case below and in *Bishop v. Osborn Transportation, Inc.*, 838 F.2d 1173 (11th Cir. 1988) (sections 502(a)(1)(B), 502(a)(3), and 510 do not provide for punitive damages). By way of dictum the Eighth Circuit Court of Appeals can also be counted in this group. *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981).

The First Circuit most recently joined the other circuits on this issue, saying:

> [W]e conclude, as have the Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, that extra-contractual damages are unavailable under § 1132(a)(3). We give our transcontinental imprimatur to the Ninth Circuit's simple, appealing expression of that conclusion: "[I]t appears that Congress used the word 'equitable' [in § 1132(a)(3)] to mean what it usually means – injunctive or declaratory relief." (footnotes omitted).

*Drinkwater*, 846 F.2d at 825 (quoting *Sokol v. Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986)).

This degree of unanimity among the circuits indicates that consideration of the issue by this Court is unnecessary.

2. The conclusion of the several circuit courts that extra-contractual compensatory and punitive damages are not recoverable under ERISA by a participant or beneficiary was foreshadowed by this Court's opinion in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134

(1985). This Court held that extra-contractual damages are not authorized by § 409 and § 502(a)(2), and that a private right of action for extra-contractual damages may not be implied under the principles of *Cort v. Ash*, 422 U.S. 66 (1975). Plaintiff was seeking both extra-contractual compensatory damages and punitive damages based on alleged wrongful delay in processing ERISA benefit claims. This Court reversed the ruling of the Ninth Circuit Court of Appeals that recovery of such damages is authorized under § 409 of ERISA. Although the opinion expressly limited this part of its holding to § 409 and § 502(a)(3) of ERISA, 473 U.S. at 139, n.5,[3] it is a logical consequence of the reasoning in *Russell*, and has been recognized as such by all circuit courts to address the issue, that extra-contractual damages for denial of benefits are not authorized by any other provision of ERISA. Several of the observations in the Court's opinion in *Russell* apply with equal or greater force to the issue whether extra-contractual damages are recoverable under other provisions of ERISA, more specifically § 502(a)(1)(B) and § 502(a)(3).[4]

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[3] Enforcement of § 409 of ERISA is provided for in § 502(a)(2).

[4] Section 502(a) of ERISA is addressed to civil enforcement and includes six subdivisions. After Russell, only the first and third are arguably pertinent to the issue at hand:

> A civil action may be brought–
>
> (1) by a participant or beneficiary–
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the

(Continued on following page)

For example, the opinion notes "the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his right under the plan – § 502(a)(1)(B) . . . – says nothing about the recovery of extra-contractual damages . . . ". 473 U.S. at 144. This is also true of § 502(a)(3), so there is nothing in the language of the civil enforcement provisions of ERISA authorizing an award of extra-contractual damages for wrongful denial of benefits. Indeed, attribution of extra-contractual remedies to either § 502(a)(1)(B) and § 502(a)(3) would be contrary to the statutory language. Section 502(a)(1)(B) specifies recovery of *"benefits due* to him under the *terms of his plan"* and an enforcement of rights "under the *terms of the plan.*" Section 502(a)(3) in pertinent part authorizes courts to award "other appropriate *equitable* relief." An award of extra-contractual damages, including punitive damages, is not an *equitable* remedy within any accepted understanding of equitable jurisprudence.

In addition, the opinion correctly observes that ERISA makes available a "panoply of remedial devices" to a beneficiary whose benefits are wrongfully denied. 473 U.S. at 146. Despite petitioners' intemperate assertions that present interpretation fosters uncompensated

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terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . .

(3) by a participant, beneficiary, or fiduciary, (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

. . .

ERISA injuries, Congress was not stingy in enacting its make-whole philosophy. Thus a beneficiary who establishes entitlement to ERISA benefits which an administrator or fiduciary has denied can recover the accrued benefits, interest, and attorneys' fees. Participants and beneficiaries can also obtain injunctive or declaratory relief concerning their rights under the plan, § 502(a) (3), or an order directing removal of the plan's fiduciary, § 502(a) (2). The Court in *Russell* therefore aptly concluded that the evident care with which Congress crafted the civil enforcement provisions in § 502(a) of ERISA substantially discounts the possibility that Congress inadvertently omitted a remedy for extra-contractual damages.

In reviewing the legislative history of ERISA, the *Russell* opinion notes that a provision in an earlier version of the statute for *legal or equitable relief* was changed in the statute as enacted to delete the reference to *legal* relief. 473 U.S. at 145, 146. This supports the opinion's conclusion of a "stark absence" in the legislative history "of any reference to an intention to authorize the recovery of extra-contractual damages" 473 U.S. at 148.

Respondents do not contend that *Russell*'s holding against recovery of extra-contractual damages under § 502(a) (2) of ERISA expressly extends to § 502(a) (1) (B) and § 502(a) (3). Respondents do contend, however, that such an extension logically follows from *Russell* and that the above-noted observations in the *Russell* opinion militate strongly against extra-contractual damages in ERISA benefit cases under any of the civil enforcement provisions.

The holding in part II of the *Russell* opinion, 473 U.S. at 145, that a private right of action for extra-contractual damages may not be implied under ERISA, forecloses petitioners' argument that such damages should be recoverable as a matter of federal common law. Significantly, the petition does not address this aspect of *Russell*. The only question left open in *Russell* implicated by the instant petition is one of statutory interpretation of § 502(a).

3. This Court's opinion in *Firestone Tire & Rubber Co. v. Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L Ed.2d 80 (1989), contrary to petitioners' contention, does not support recoverability of extra-contractual damages under ERISA. In *Firestone*, the court held that the standard of judicial review of benefit determinations by a plan administrator or fiduciary depends on the language of the plan. The standard of review is *de novo* unless the plan grants to the fiduciary discretionary authority to make benefit determinations or construe the language of the plan. Thus, the holding of *Firestone* does not speak to the question presented by this petition.

Apart from its holding, the rationale of *Firestone* supports the status of the law in the circuits that extra-contractual damages are not recoverable under ERISA. This follows from *Firestone*'s solidification of the connection between ERISA and the substantive law of trusts. Given that the substantive law of trusts does not authorize a trust beneficiary to recover from a trustee punitive damages and non-contractual compensatory damages (such as damages for emotional distress, inconvenience, and the like), *see generally* § 205, *Restatement (Second) of Trusts* (1959), *Kleinhans*, 810 F.2d at 627, *Sommers*, 793 F.2d

at 1464, the reference to trust law signalled by *Firestone* dictates against extra-contractual remedies.

4. The "legislative history" cited by the petitioners is not authoritative and does not justify granting a writ of certiorari. The committee report cited is House Report No. 801, Part II, 100th Cong., 2d Sess. This is a committee report of the House Education and Labor Committee issued to accompany House Bill H.R. 4845, the Miscellaneous ERISA Amendments Act of 1988. Although the report expresses the view that federal courts should develop federal common law remedies under ERISA, the report is not authoritative and is not indicative of Congressional intent in adopting ERISA.

The committee report accompanied proposed legislation which was never adopted. Therefore it cannot properly be considered "legislative history" as that term is commonly used.

Further, the views expressed in the report published 14 years after the adoption of ERISA do not legitimately bear upon Congressional intent in enacting ERISA. This house committee in 1988 is no more qualified to assess Congressional intent in adopting ERISA than was this Court in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134. As noted by the Court in *Firestone*, ___ U.S. at ___, 109 S.Ct. at 956, 103 L.Ed.2d at 95:

> "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960).

Finally, the proposition advanced in the committee report, that federal courts should imply extra-contractual

remedies under ERISA, has already been rejected by this Court in *Russell*. *Russell*, 473 U.S. at 145-148. The issue left undecided in *Russell* (and answered in the negative by the circuit courts) – whether extra-contractual damage remedies are expressly authorized under § 502(a) (3) of ERISA – is not addressed in the committee report.

5. In this case below it was the district court's theory that ERISA preempts state law claims by "absorbing" them and converting them into federal claims, with the consequence that the state law remedy of punitive damages is afforded by federal law. 681 F.Supp. at 1517.

The opinion of the Court of Appeals below rejected this theory, 868 F.2d at 432. Petitioners have surrendered this theory in their petition and argue instead on other grounds. Accordingly, respondents will not address the novel "absorption" theory further in this brief in opposition, other than to note that the theory is incompatible with *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), and that the theory has no precedential support.

## CONCLUSION

For the foregoing reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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